90-1106

Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: GRAND JURY SUBPOENA FOR ATTORNEY REPRESENTING JOSE EVARISTO REYES-REQUENA (MIKE DeGEURIN)

MIKE DeGEURIN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE SIXTH AMENDMENT SHOULD PROHIBIT THE PROSECUTOR FROM INTERFERING WITH THE RELATIONSHIP BETWEEN A CRIMINAL DEFENDANT AND HIS LAWYER BY SUBPOENAING THE LAWYER TO TESTIFY TO THE GRAND JURY DURING A CRITICAL STAGE OF THE PROSECUTION.

LIST OF PARTIES BELOW

1. United States of America, Respondent
2. Mike DeGeurin, Attorney for Jose Evaristo-Reyes Requena
3. Dick DeGuerin, Attorney for Mike DeGeurin
4. Jose Evaristo-Reyes Requena, Defendant in the underlying criminal case and client of Mike DeGeurin
5. National Association of Criminal Defense Lawyers, Represented by Gerald Goldstein
6. American Trial Lawyers Association, Represented by Jack B. Zimmerman
7. Harris County Criminal Lawyers Association, Represented by Jim E. Levine
8. Texas Criminal Defense Lawyers Association, Represented by Kent Shaffer

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2. *In Re*: *Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena,* 913 F.2d 1118 (5th Cir. 1990).

3. *In Re*: *Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena,* ____F.Supp.____ (S.D. Tex. Dec. 17, 1990 Misc. No. H-90-586) (order after remand).

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254. The Court of Appeals rendered its opinion on September 19, 1990. Panel Rehearing and Suggestion for Rehearing En Banc were denied on October 11, 1990.

STATEMENT OF THE CASE

Petitioner Mike DeGeurin, a criminal defense attorney, appeared in Federal Court to represent Defendant Jose Evaristo Reyes-Requena shortly after Reyes-Requena's arrest, and continued to represent him at all times thereafter. Following a combined preliminary and detention hearing against Reyes-Requena and, on the same day as that hearing, the prosecution served a Grand Jury subpoena on Petitioner seeking information concerning Reyes-Requena's legal fee arrangement. Petitioner moved to quash the subpoena and the District Court granted that motion holding that the information sought by the prosecution would violate the attorney-client privilege existing between Petitioner and his client Reyes-Requena and would interfere with Reyes-Requena's sixth Amendment right to his chosen counsel at a critical stage of the prosecution, diverting Petitioner's attention from representing Reyes-Requena to fending off the Grand Jury Subpoena; additionally, the District Court held that its own supervisory power under Fed.R.Crim.P. 17C mandated quashing the subpoena as unduly burdensome and oppressive. *See In Re: Grand Jury Subpoen.. for Attorney Representing Criminal Defendant Reyes-Requena (Mike DeGeurin)*, 724 F.Supp. 458 (S.D. Tex. 1989). The District Court made factual findings as follows:

"The Court thus finds that the facts of this case mandate the quashing of a subpoena which seeks to illicit the last link of incriminating evidence against Intervenor [Reyes-Requena] from his attorney [Mike DeGeurin]. The subpoena has been served upon the attorney during the pendency of criminal proceedings, and seeks information that could be relevant too those proceedings. Although in other context, that information may not be privileged, in this case the relevation of such information may, in fact, provide the crucial link in the Government's case. The privilege here is not abrogated by any suggestion that it is raised as a shield to further illicit activity, as the Government does not contend that Mike DeGeurin was retained in this case for that purpose."

* * *

"Accordingly, the Court concludes that under the circumstances, the information sought is subect to the attorney-client privilege." 724 F.Supp. at p. 464.

* * *

"The service of a subpoena upon an attorney during the pendency of a criminal proceeding for which the attorney has been retained has, at the least, a chilling effect upon his ability to represent his client."

* * *

"In the instant case, the Government has subpoenaed a defense attorney during the pendency of indictment proceedings. The subpoena here impinges upon the attorney-client relationship and, by diverting attention from the preparation of the client's defense, severely hinders the attorney's effectiveness in representing him. Accordingly, apart

from the issue of privilege, the Court would quash the subpoena given the timing of, and circumstances surrounding, its issuance." Ibid. at p. 456.

* * *

"The subpoenaing of Mike DeGeurin under the circumstances presented here threatens the integrity of the adversarial process protected by the Sixth Amendment. Whereas forfeiture of fees may deprive a defendant of counsel of his choice, the subpoenaing of his attorney not only may deprive a defendant of his chosen counsel but also may turn that attorney into a witness against him. The latter occurrance, in which an adversary forcibly enlists the aid of his opponent, contravenes the principals of the adversarial system." Ibid. at p. 466.

The Court of Appeals for the Fifth Circuit reversed. *In Re: Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena (Mike DeGeurin)*, 913 F.2d 1118 (5th Cir. 1990). While mentioning with approval the Rule 17C grounds for quashal based on the timing of the subpoena, the Court of Appeals held that the passage of time, duruing which Reyes-Requena was convicted at trial, mooted the Rule 17C and Sixth Amendment grounds for quashing the Grand Jury subpoena. *See In Re: Grand Jury Subpoena For Attorney Representing Criminal Defendant Reyes-Requena (Mike DeGeurin)*, 913 F.2d 1118, 1129 (5th Cir. 1990). Further, the Fifth Circuit held that Petitioner had not met his burden of showing that the information sought was a confidential communication betwween Reyes-Requena and Petitioner or that it was inescapably tied to such privileged communication even though the District Court had found it was, declining Petitioner's offer to present evidence *in camera* on this point. Thus, the

Court of Appeals remanded to the District Court for further proceedings, refusing to stay its mandate pending furuther appeal or certiorari.

After remand, Petitioner appeared before the Grand Jury but again refused to comply fully with the prosecution's subpoena. The District Court then refused the Government's effort to have Petitioner held in contempt, issuing an Order on Dec. 17, 1990. *See Re: Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena (Mike DeGeurin)*, ____F.Supp.____ (S.D. Tex. Dec. 17, 1990, Misc. No. H-90-586).

The instant Petition for Certiorari is directed at the Opinion of the Court of Appeals, and not at the events in the District Court following remand from the Court of Appeals.

REASON FOR GRANTING THE WRIT

A subpoena directed to a lawyer representing a criminal defendant is calculated to destroy the attorney-client relationship. Issued at a critical stage of the prosecution against the defendant it diverts the lawyer's attention from his client. Where there is no suggestion or suspicion of improper conduct on the part of the lawyer, as here, the thought that a lawyer might be forced to reveal *anything* the client told him is enough to severely chill the underlying purpose of the attorney-client privilege: full and free disclosure by the client to the lawyer. *Fisher v. United States*, 425 U.S. 391 (1976). Although client identity and fee arrangements are not ordinarily protected as privileged, *In Re: Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666 (5th Cir. 1975),

> "client retention and fee information may become privileged if the revelation would in itself reveal a confidential communication." *In Re: Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena (Mike DeGeurin)*, 913 F.2d at 1126 (citing *In Re: Grand Jury Proceedings (Jones)*, 517 F.2d at 688 and *In Re: Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc).

Thus, *Jones* "protects a disclosure that would reveal the confidential *motive for retention* of the attorney." *Reyes-Requena*, 913 F.2d at 1126. (emphasis added). The Court of Appeals improperly decided this case based on events which occurred after the District Court had made its ruling, and in a different context. In short, the circumstances had changed with the passage of time, but these circumstances and factual changes were *dehors* the record. In other words, the Court of Appeals decided a case that was not before it. Instead, the Court of Appeals should have viewed the circumstances as they existed at the time the District Court made its ruling, and under those circumstances, should have affirmed.

This case is of extreme importance to the bench and bar. Prosecutors could easily use a Grand Jury subpoena to disqualify a criminal defendant's chosen attorney, thus controlling the quality and personality of the lawyer representing a criminal defendant, should this decision stand. On the other hand, it should be clear that at a critical stage of the prosecution, where there is no suggestion of improper conduct on the part of the lawyer, and where the information sought from the lawyer would invade the area of confidential communications between lawyer and client, the Sixth Amendnment should prohibit a prosecutor from subpoenaing the defense lawyer; the information should be presumptively privileged; and the

use of F.R.Crim.P. Rule 17C is a proper exercise of the District Court's supervisory power and should not be disturbed on appeal.

To allow the prosecution unbridled use of a Grand Jury subpoena directed to a defense attorney, the ultimate result of which is to disqualify a criminal defendant's chosen attorney should he give information against his own client, and the immediate result of which is to violate private and privileged communications, thus chilling the accused's right to fully disclose facts to his lawyer, is to concede vast advantage to one party to the litigation. The Supreme Court should consider this terrible potential for abuse and hold that the Sixth Amendment is not to be broached in this manner.

CONCLUSION AND PRAYER

Petitioner requests the Supreme Court to settle this question of dire importance too the bench and bar, holding that the prosecution is prohibited by the Sixth Amendment from subpoenaing a criminal defendant's lawyer at a critical stage of the prosecution when such action would undermine the attorney-client relationship and chill full disclosure by client to lawyer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Dick DeGuerin, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing three (3) copies of this document in an envelope, first-class postage prepaid and addressed to:

1. The Honorable Rex E. Lee
   Solicitor General of the United States
   Washington, D.C. 20530

2. Mervyn Hamburg
   Appellate Section
   Criminal Division
   Department of Justice
   P.O. Box 899
   Ben Franklin Station
   Washington, D.C. 20044-0899

3. Mr. Lawrence Finder
   Assistant U.S. Attorney
   515 Rusk
   Houston, Texas 77022

DICK DEGUERIN

APPENDIX A

In re GRAND JURY SUBPOENA FOR ATTORNEY REPRESENTING CRIMINAL DEFENDANT Jose Evaristo REYES-REQUENA.

Misc. No. H-88-522,

United States District Court,

S. D. Texas,

Houston Division.

Oct. 31, 1989.

Attorney for narcotics defendant moved to quash grand jury subpoena seeking disclosures of fee information. The District Court, Hittner, J., hel that: (1) neither internal Justice Department attorney subpoena guidelines nor state Code of Professional Responsibility required quashing subpoena; (2) fee information was subject to attorney-client privilege because it could constitute "last link" in chain of evidence leading to defendant's conviction; and (3) service of subpoena could violate defendant's Sixth Amendment rights.

Subpoena quashed.

Henry K. Oncken, U.S. Atty., Susan Kempner, Lawrence D. Finder and Kenneth Magidson, Attys., Houston, Tex.

Dick DeGuerin, DeGuerin & Dickson, Houston, Tex., for Mike DeGeurin.

Jim E. Lavine, Houston, Tex., for Harris County Crim. Lawyers Ass'n.

Jack B. Zimmerman, Association of Trial Lawyers

of America, Houston, Tex., for American Trial Lawyers Ass'n.

Kent A. Schaffer, James Clifford Sabolos, Don Ervin, Houston, Tex., for Tex. Crim. Defense Lawyers Ass'n.

Gerald H. Goldstein, Goldstein, Goldstein & Hilley, San Antonio, Tex., for Nat. Ass'n. of Crim. Defense Lawyers.

O R D E R

HITTNER, District Judge.

Pending before this Court is the Motion to Quash Grand Jury Subpoena for Attorney of Record for Defendant Jose Evaristo Reyes-Requena. Mike DeGeurin (Document No. 2).

The Court has considered petitioner's motion and the Government's response. On October 2, 1989, the Court heard the arguments of movant, Mike M. DeGeurin, his attorney, Dick DeGuerin, and the Government, represented by Lawrence D. Finder. Additionally, the Court heard the arguments of representatives from the National Association of Criminal Defense Lawyers, the Texas Criminal Defense Lawyers Association, the Harris County Criminal Lawyers Association and the Association of Trial Lawyers of America, who were granted leave to appear as amici curiae in this action. Having reviewed the foregoing and the applicable law, the Court concludes that the motion to quash shoulld be, and hereby is, granted.

BACKGROUND

The Intervenor, Jose Evaristo Reyes-Requena ("Reyes-Requena"), was arrested on or about September 18,

1989, in a residence containing in excess of 141 kilograms of a substance believed to be cocaine. Reyes-Requena was in the living room sleeping on a bedroll on the floor. A loaded .357 magnum revolver was subsequently found under the blankets. Agents found the cocaine in the front bedroom. Intervenor was charged with possession with intent to distribute in excess of five kilograms of cocaine, a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), in Cause No. H-89-884M pending in the Southern District of Texas.

On September 22, 1989, a United States Magistrate held a combined preliminary examination and detention hearing. During cross-examination by defense counsel Mike DeGeurin, an FBI witness related the substance of certain postarrest statements made by Intervenor. In summary, Intervenor told an agent that he had come to the Houston area approximately two months previously from Matamoros, Mexico, and was unemployed. He met a person, whom he called "Chapa," who offered Intervenor the use of a residence and food in exchange for watching the residence. Intervenor stated that he had seen Chapa bringing boxes into and out of the house. It was at this residence that Intervenor was arrested. At the conclusion of the preliminary examination, the magistrate found the evidence sufficient to support a finding of probable cause for arrest. Intervenor was subsequently released on bond.

After the hearing, the Government prepared a grand jury subpoena directed to Mike DeGeurin, which was executed sometime on or after September 26, 1989. The subpoena requested that Mike DeGeurin testify before the federal grand jury on September 29, 1989, and that he bring to the grand jury

> any and all documents or records pertaining to legal fees received or due to you or your law firm for your representation of Jose Evaristo Reyes-Requena, including, but not limited to fee agreements or contracts for the representation of Jose Evaristo Reyes-Requena; receipts or invoices for fees received or owed for the representation of Jose Evaristo Reyes-Requena; and any memoranda, papers or recordings concerning the source of fees paid or due you or your law firm for the representation of Jose Evaristo Reyes-Requena.

Mike DeGeurin, represented by his brother, Dick DeGuerin,[1] now asks this Court to quash the Government's subpoena.

ANALYSIS

The issue before this Court is whether in the course of on going criminal proceedings the Government may serve a grand jury subpoena upon an attorney seeking disclosure of fee information so as to "ascertain the breadth of criminal activity." Government's Response to Motion to Quash Grand Jury Subpoena for Attorney of Record for Defendant Jose Evaristo Reyes-Requena, Mike DeGeurin, at 3 [hereinafter Government's Response].

Mike DeGeurin argues that this Court should quash the subpoena on the following grounds: (1) the subpoena was issued in violation of the Justice Department's internal guidelines requiring approval of the Assistant Attorney General of the Criminal Division before an Assistant United States Attorney may issue a subpoena to an attorney (citing U.S. Department of Justice, At-

1. The brothers spell their last names differently.

torney Subpoena Guidelines, Executive Office for the United States, Department of Justice, United States Attorneys' Manual § 9-2.161(a) (1985) [hereinafter DOJ Manual]); (2) compliance with the subpoena would contravene movant's obligations under the Code of Professional Responsibility of the State of Texas, which requires that he not divulge any facts which came to his attention by reason of an attorney-client relationship (citing Supreme Court of Texas, State Bar Rules Art. 10, § 9 (Code of Professional Responsibility) Canon 4, DR-4-101, *reprinted* in Tex. Gov't Code Ann. tit. 2, subtit, G App. (Vernon 1988) [hereinafter Texas Code of Professional Responsibility]); (8) the subpoena violates the attorney-client privilege; and (4) service of the subpoena upon the Intervenor's attorney deprives the Intervenor of his sixth amendment right to counsel.

A. *Department of Justice Guidelines*

[1] The United States Department of Justice Attorney Subpoena Guidelines provide that prior to the issuance of a subpoena to an attorney relating to the representation of a client, the Assistant Attorney General of the Criminal Division must determine, in part, that:

> The reasonable need for the information . . . outweigh[s] the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client.

DOJ Manual, supra, § 9-2.161(a)(E)(4). Movant contends that the Government failed to obtain the requisite

prior approval and that, accordingly, the subpoena must be quashed. The Government responds that it did obtain prior approval and even if it had not, failure to comply with internal guidelines is not grounds to quash a subpoena.

[2] Generally, courts will decline to enforce federal agency guidelines, such as those at issue here, that are not mandated by statute or the Constitution. *See e.g., United States v. Caceres*, 440 U.S. 741, 755-56, 99 S. Ct. 1465, 1473-74, 59 L.Ed.2d 733 (1979). Additionally, the Department of Justice guidelines include a specific proviso negating enforceability:

> These guidelines . . . are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

DOJ Manual, *supra*, § 9-2.161(a), *see also* Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 U.Pa.L.Rev. 1783, 1819 (1988) ("[DOJ] [g]uidelines are completely unenforceable").

The Court thus concurs with the Government that any failure to comply with internal guidelines is not a basis for quashing the Government's subpoena.[2]

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2. It is therefore unnecessary to determine whether the Government complied with the guidelines.

B. *Code of Professional Responsibility*

[3] Mike DeGeurin next argues that compliance with the subpoena would cause him to violate the Texas Code of Professional Responsibility. Rule 4 B of Appendix 3 of the Local Rules for the United States District Court for the Southern District of Texas provides that an attorney's conduct before the Courts of the Southern District of Texas is governed by the Code of Professional Responsibility of the State Bar of Texas. Disciplinary Rule 4-101 of the Texas Code of Professional Responsibility provides that "a lawyer shall not knowingly", . . . [r]eveal a confidence or secret[3] of his client." Texas Code of Professional Responsibility, *supra*, DR 4-101(B).

Without reaching the issue of whether the information sought falls within the attorney-client privilege and is thus a "confidence," this Court concludes that enforcement of the subpoena would not cause movant to violate his ethtical obligations under the Code. In addition to the foregoing provision, the Texas Code also provides that an attorney may reveal confidences and secrets when "required by law or court order." *Id.* DR 4-101 (C)(2). Under the circumstances here, Mike DeGeurin's compliance would be compelled by a court order enforcing the subpoena. Accordingly, the Court is unable to find that any resulting disclosure would constitute an ethical violation. *See* Stern & Hoffman, *supra*, at 1815-16.

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3. " 'Confidanes' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to otther information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Texas Code of Professional Responsibility, *supra*, DR 4-101(A).

C. *Attorney-Client Privilege*

[4] Pursuant to Rule 26 of the Federal Rules of Criminal Procedure, federal common law governs the applicability of the attorney-client privilege in this circuit. *In re Grand Jury Proceedings Jones,* 517 F.2d 666, 669-70 (5th Cir. 1975). The privilege applies in the following instance:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal advisor, (8) except the protection be waived.

8 J. Wigmore, Evidence § 2292, at 554 (McNaughton rev. ed. 1961). Generally, the identity of a client is not privileged, *Frank v. Tomlinson,* 351 F.2d 884, 384 (5th Cir. 1965) ,*cert.denied,* 382 U.S. 1028, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966), nor are matters involving the receipt of fees, *United States v. Finley,* 484 F.2d 596, 597 (5th Cir. 1970).

Accordingly, the Government contends that the information sought by subpoena is not privileged. Movant and amici argue, however, that despite the general rule, the information is nonetheless protected under an exception first articulated in this circuit in *In re Grand Jury Proceedings (Jones),* 517 F.2d 666 (5th Cir. 1975).

In quashing several subpoenas the *Jones* court concluded that despite the generally unprivileged nature of client Identity and fee information, certain "information, not normally privileged, should . . . be protected when so much

of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions." *Id.* at 674

The Government contends that the socalled "last link"[4] exception is narrowly construed by the courts. Furthermore, the Governments argues, the exception does not exempt Mike DeGeurin from compliance, as the information sought by the subpoena does not constitute the last link in a chain of evidence leading to the indictment of Mike DeGeurin's client.[5]

1. "Last Link" Exception

The determination of whether the narrow last link exception applies to exempt a subpoenaed attorney from disclos-

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4. Subsequent to *Jones*, the Fifth Circuit refined the exception. Whereas the exception as formulated by the *Jones* court encompassed attorney disclosures which provided "*probative links* in an existing existing chain of evidence," *Jones*, 517 F.2d at 674 (emphasis added), in *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. Unit A 1982) (en banc), the court deemed only those disclosures supplying the "last link" in the chain of evidence as privileged. *Id.* at 1027. As the court offered no explanation for the reformulation and, in fact, referred to *Jones* while discussing the exception, the precise significance of the modification is unclear.

5. Some confusion exists concerning on whose behalf Mike DeGeurin is invoking the privilege. The Government, in its response to the Motion to Quash states that "the motion is unclear as to whom movant is invoking the privilege." Government's Response, *supra*, at 6. At this court's October 2, 1989, hearing on the Motion to Quash, Mike DeGeurin stated that he was invoking the privilege on behalf of the Intervenor, Reyes-Requena. Accordingly, this Court will consider the privilege and any exceptions thereto in light of the attorney-client relationship which the Government has conceded exists between Mike DeGeurin and Reyes-Requena. *Id.*

ing fee information or client identity[6] must be made on a case-to-case basis. *Jones*, 517 F.2d at 671. *Jones* involved a grand jury investigation of certain individuals for suspected narcotics and tax violations. The governmnt subpoenaed the target's attorneys, seeking to learn the source of their fees and the identity of possible third-party benefactors. *Id.* at 668-69. The court rejected the government's argument that information about client identity, fee and bonding

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6. The Court notes that with respect to the case law concerning the application of the attorney-client privilege to questions of client identity and fees, "[c]ourts generally do not distinguish among . . . [various] fact patterns, applying case law developed in one context to the others. *See, e.g., In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983) (applying cases concerning the discovery of client identity to a situation involving the discovery of fee information)." *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1517-18 n. 91 (1985).

> There are generally three basic fact patterns—two involving identify and one involving fees—in which adversaries, usually law enforcement officers, seek such information. In the first, a taxpayer ascertains that he owes taxes for prior periods, pays the outstanding sums anonymously through his attorney to avoid possible criminal liability, and the authorities seek the taxpayer's identity from the attorney. *See, e.g., Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In the second fact pattern, an anonymous party pays the legal fees of another party who faces a criminal charge, typically drug trafficking. As in the case of anonymous tax payment, authorities seek the identity of the anonymous party, here under the assumption that the defendant was working for the anonymous party. *See, e.g., In re Grand Jury Proceedings (Pavlick)*, 663 F.2d 1057 (5th Cir. 1981), *rev'd*, 680 F.2d 1026 (5th Cir. 1982) (en banc); *United States v. Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977). In the third situation, the authorities are investigating possible tax evasion by comparing information on attorney's fees sought from the attorney, with the client's declared income. The client may have paid the attorney more money than he has declared as income. *See, e.g., In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975).
>
> *Id.*

The factual situation here varies somewhat from the preceding patterns. In this case, the Government issued a preindictment subpoena to a defendant's attorney in order to "learn the breadth of

arrangements were not privileged "unless disclosure would lead automatically to conviction for a criminal offense." *Id.* at 672. In rejecting a test of "quantum sufficiency," the court noted that "the correct approach is a matter of logical relevances and probative value." *Id.* (citing *Baird v. Koerner*, 279 F.2d 623, 633 (9th Cir. 1960)). The court quashed the subpoena finding that disclosure by the attorneys would be relevant to "corroborating or supplementing already existing incriminating information." *Id.* at 674.

Subsequently, the Fifth Circuit declined to quash an attorney subpoena in *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1926 (5th Cir. Unit A 1982) (en banc), *Pavlick* concerned a government motion to compel disclosure from an attorney, Pavlick following the conviction of three of his clients on marijuana charges. When called before the grand jury, Pavlick refused to identify the third party who had retained him to represent the smugglers, claiming attorney-client privilege. *Id.* at 1027. The court stated that such information was privileged only if "disclosure of the client's identity by his attorney would have supplied the *last link* in an existing chain of incriminating evidence likely too lead to the client's indictment." *Id.* (emphasis added). In reversing the trial court's denial of the motion to compel, the court observed that the information the government sought was "by no means the last link in any chain of inculpatory events" and would not necessarily give the government the evi-

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[the] criminal activity." Government's Supplemental Response to Motion to Quash Grand Jury Subpoena for Attorney of Record for Defendant Jose Evaristo Reyes-Requena, Mike DeGeurin at 2. Mike DeGeurin seeks to invoke the privilege on behalf of the defendant, not an unknown third-party benefactor. Thus, although this fact pattern differs from those of preceding cases, this Court will follow its predecessors and apply law developed in other contexts.

dence necessary to indict the benefactor. *Id.* at 1027 & n. 2.

As the *Jones* court observed, however, application of the "last link" exception is fact-specific. *Jones, Pavlick,* and other cases suggest that there are also certain factors that are significant in determining if an attorney will be exempted from compliance with a subpoena. First, the current status of the attorney-client relationship and the criminal proceedings is relevant to a decision to quash. A subpoena directed to an attorney who represented the client in a prior unrelated case will be unlikely to elicit information constituting the "last link" in a chain of evidence relevant too the current charge. *E.g., In re Grand Jury Subpoena,* 774 F.2d 624, 628 (4th Cir. 1985) (exception inapplicable as "documents at issue do not concern payment of legal fees as to *this* investigation" (emphasis added)), *cert. denied,* 475 U.S. 1108, 106 S. Ct. 1514, 89 L.Ed.2d 913 (1986).

Second, evidence that clients or third-party benefactors have used attorneys and the privilege as shields for continued illicit activity affects judicial application of the exception. *E.g., Pavlick,* 680 F.2d at 1028. In declining to quash the subpoena, the *Pavlick* court concluded that the attorney had been retained to further incipient or pre-existing criminal or fraudulent activity. *Id.* at 1028-29 (evidence here that "act of furnishing . . . counsel was an act done in furtherance of the illegal scheme itself" distinguishes case from *Jones*); *see also In re Grand Jury Subpoenas,* 803 F.2d 493, 499 (8th Cir. 1986) ("what is really involved in this case is an attempt to employ the attorney-client privilege to shield those who might be involved in illegal activity").

Applying the foregoing to the facts at bar, the Court concludes that the subpoena directed to Mike DeGeurin must be quashed. Currently, the Government has what is termed a "mere presence" case against the Intervenor. Intervenor has been charged with possession with intent to distribute. According to information elicited at this Court's hearing, the only evidence the Government has against Reyes-Requena is that he was asleep on a bedroll in the living room of a home in which the police subsequently found 141 kilograms of cocaine located in a bedroom. Attorneys for both the defense and the Government concede that mere presence where a crime is committed and knowledge that the crime is being committed are insufficient as a matter of law to prove guilt of the crime. Preliminary and Detention Hearings before the United States Magistrate, CR. H-89-834M, at 57-58, 61 (Sept. 22, 1989). A subpoena to Reyes-Requena's attorney, however, could elicit information providing an affirmative connection between the Intervenor and the cocaine.

Mike DeGuerin's compliance with the subpoena could possibly provide the Government with evidence that Reyes-Requena had knowledge of the contraband's presence. Such evidence would tend to connect Reyes-Requena to the cocaine, thus establishing a stronger case against him than "mere presence." Additionally, the information sought may provide evidence of the existence of a conspiracy, allowing the Government to bring additional charges against the Intervenor.

The Court thus finds that the facts of this case mandate the quashing of a subpoena which seeks to elicit the last link of incriminating evidence against Intervenor from his attorney. The subpoena has been served upon the

attorney during the pendency of criminal proceedings, and seeks information that could be relevant to those proceedings. Although in other contexts, that information may not be privileged, in this case the revelation of such information may, in fact, provide the crucial link in the Government's case. The privilege here is not abrogated by any suggestion that it is raised as a shield to further illicit activity, as the Government does not contend that Mike DeGeurin was retained in this case for that purpose. *See In re Grand Jury Subpoena,* 803 F.2d at 499.

Accordingly, the Court concludes that under the circumstances, the information sought is subject to the attorney-client privilege.

D. *Rule 17(c) Supervisory Power*

[5] Although the Court has determined that the subpoena should be quashed pursuant too the attorney-client privilege, the Court also notes that it may, under Rule 17(c) of the Federal Rules of Criminal Procedure, quash a subpoena duces tecum found to be "unreasonable or oppressive," independent of a finding of privilege.

Rule 17(c) provides that "[t]he court on motion . . . may quash or modify . . . [a] subpoena if compliance would be unreasonable or oppressive." Fed.R.Crim.P. 17(c). Courts have also invoked the more general supervisory power to quash a subpoena based on "the particular circumstances under which it was issued." Stern & Hoffman, *supra,* at 1813. The most prevalent justification for quashing a subpoena under Rule 17(c) appears to be the timing of the subpoena. *E.g., In re Grand Jury Subpoena (Legal Servs. Center),* 615 F.Supp. 958, 969-70 (D.Mass.1985) (noting that "the timing of the grand jury's subpoenas, coming as they do while

the petitioners are involved in pending INS proceedings on behalf of their clients, is unreasonable and oppressive"); *In re Grand Jury Matters,* 593 F.Supp. 103, 105 (D.N.H.) (stating that a "very important premise is that the actions *are pending* in a New Hampshire [s]tate [c]ourt and under investigation in . . . [f]ederal [c]ourt"), *aff'd,* 751 F.2d 13 (1st Cir. 1984). The service of a subpoena upon an attorney during the pendency of a criminal proceeding for which the attorney has been retained has, at the least, a chilling effect upon hiis ability to represent his client. *See Legal Servs. Center,* 615 F.Supp. at 970; *In re Grand Jury Matters,* 593 F. Supp. at 107.

In the instant case, the Government has subpoenaed a defense attorney during the pendency of indictment proceedings. subpoena here impinges upon the attorney-client relationship and, by diverting attention from the preparation of the client's defense, severely hinders the attorney's effectiveness in representing him. Accordingly apart from the issue of privilege, the Court would quash the subponea given the timing of, and circumstances surrounding, its issuance.

E. *Sixth Amendment*

[6] Although it has already reached its decision on other nonconstitutional grounds, the Court finds it advisable to address movant's constitutional objection to the subpoena. Movant contends that the service of a subpoena on the Intervenor's attorney deprives the Intervenor of his sixth amendment right to counsel. Amici argue that the subpoena chills the attorney-client relationship by: (I) causing the client to mistrust his attorney; (2) creating a conflict of interest as a result of

the competing interests of the attorney and his client; (3) diluting the attorney's effectiveness by diverting his attention from preparation of his client's defense; and (4) possibly causing disqualification of the attorney. The Government responds that compelling Mike DeGeurin to disclose the identity and fee arrangements of a benefactor does not deprive the Intervenor of his sixth amendment rights. The Government relies primarily upon the recent United States Supreme Court decision in *Caplin & Drysdale v. United States*, ____U.S.____, 109 S. Ct. 2646, 105 L.Ed.2d 528 (1989).[7]

The sixth amendnment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. Generally, although subject to certain limitations, a defendant has the right to counsel of his choice. *See Powell v. Alabama*, 287 U.S. 45, 53, 58 S. Ct. 55, 58, 77 L.Ed.2d 158 (1982). Recently, however, the Supreme Court further delineated the scope of a defendant's right too counsel of choice:

> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his

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7. With respect to the sixth amendment issue, the Government also relies upon *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2d Cir.) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108, 106 S. Ct. 1515, 89 L.Ed.2d 914 (1986), for the proposition that the probative value of third-party benefactor information outweighs any sixth amendment rights asserted by the benefactor. The Government's reliance is misplaced however, as the *Doe* court held that there was no infringement of the sixth amendment right to counsel for the reason that the target's sixth amendment rights had not yet attached. *Id.* at 244. Specifically, the court found that no sixth amendment right to counsel arises during a grand jury investigation of an unindicted target against whom no adversary proceeding has commenced. *Id.* at 244. The Government here does not assert that Reyes-Requena's sixth amendment right to counsel has not yet attached.

> choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of counsel." A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.

Caplin & Drysdale, 109 S. Ct. at 2652 (citation omitted). In *Caplin & Drysdale*, the petitioner's client had pleaded guilty to a continuing criminal enterprise charge and agreed to forfeit pursuant to 21 U.S.C. § 853, all of the assets specified in the indictment. *Id.* at 2649-50. Subsequently, petitioner filed a petition under the forfeiture statute seeking an adjudication of its rights to a portion of the forfeited property as attorney's fees, and challenging, *inter alia*, the statute as unconstitutional if such fees were not exempt from forfeiture. *Id.* at 2850. The Supreme Court affirmed the en banc decision of the Fourth Circuit in which a majority had held that the failure of the continuing criminal enterprise statute to exempt fees from forfeiture did not violate the sixth amendment. *Id.*

Caplin & Drysdale is distinguishable from the case at bar. *Caplin & Drysdale* involved statutorily authorized fee forfeiture. The Supreme Court found that any existing sixth amendment interest in using forfeitable assets to retain counsel was overridden by the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Id.* at 2655. The Government here has conceded, however, that this is not a fee forfeiture case. Neither *Caplin & Drysdale*, nor its companion case, *United States v. Monsanto*, ____U.S.____, 109 S. Ct. 2657, 205 L.Ed.

2d 512 (1989), concerned the issue presented here: whether the Government may, prior to indictment, subpoena a defendant's attorney during the pendency of criminal proceedings for which he was retained and inquire as to the existence, extent, or source of his fees.

The Supreme Court's recent reiteration of a primary policy concern in assessing a sixth amendnment claim indicates that a result distinct from that in *Caplin & Drysdale* may obtain in an attorney subpoena situation. In *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988), the Supreme Court observed that with respect to the sixth amendment, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." Id. 108 S. Ct. at 1697 (quoting *United States v. Cronic*, 466 U.S. 648, 657 n. 21, 104 S. Ct. 2039, 2046 n. 21, 80 L.Ed.2d 657 (1984)). The subpoenaing of Mike DeGeurin under the circumstances presented here threatens the integrity of the adversarial process protected by the sixth amendment. Whereas forfeiture of fees may deprive a defendant of counsel of his choice, the subpoenaing of his attorney not only may deprive a defendant of his chosen counsel but also may turn that attorney into a witness against him. The latter occurrence, in which an adversary forcibly enlists the aid of his opponent, contravenes the principles of the adversarial system.

Accordingly, given the presumption in favor of a defendant's choice of counsel, *see Wheat*, 108 S. Ct. at 1700, the strong possibility that enforcement of a government-issued subpoena to Intervenor's attorney will cause counsel's disqualification during the pendency of proceed-

ings, and the apparent absence of any overriding governmental interest, the Court concludes that *Caplin & Drysdale* would not preclude quashing the subpoena on sixth amendment grounds.

CONCLUSION

The grand jury has the "right and duty to procure every man's evidence." *In re Grand Jury Matters*, 751 F. 2d 18, 16 (1st Cir. 1984) (citing *United States v. Dionisio*, 410 U.S. 1, 9-10, 93 S. Ct. 764, 769, 35 L.Ed.2d 67 (1973)). The right may be restricted, however, by privilege, " 'constitutional, common-law or statutory' ", and by the Court's supervisory power under Rule 17(c) of the Federal Rules of Criminal Procedure. *Id.* at 17 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S. Ct. 2646, 2660, 33 L.Ed.2d 626 (1972)).

Accordingly, the Court hereby concludes that the Motion to Quash shall be, and hereby is GRANTED.

* * *

APPENDIX B

In re GRAND JURY SUBPOENA FOR ATTORNEY REPRESENTING CRIMINAL DEFENDANT Jose Evaristo REYES-REQUEQNA.

No. 89-6252.

United States Court of Appeals,
Fifth Circuit.

Sept. 19, 1990.

Attorney for drug defendant moved to quash grand jury subpoena seeking disclosure of fee information. The United States District Court for the Southern District of Texas, David Hittner, J., 724 F.Supp. 458, quashed the subpoena, and the Government appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that (1) attorney-client privilege did not protect attorney from disclosing source or payment terms of his fee; (2) although district court might not have abused its discretion in quashing subpoena solely because of its oppressive timing, defendant's subsequent conviction removed basis of district court's action; and (3) Sixth Amendment right to counsel afforded no ground for quashing subpoena, where there was no showing that subpoena would have created actual conflict between attorney and client, requiring disqualification.

Reversed and remanded.

Paula Offenhauser, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Lawrence D. Findes, Asst. Atty., Houston, Tex., Merv Hamburg, Atty., Dept. of Justice, Appellate Section, Crim. Div., Washington, D.C. for appellee.

Dick DeGeurin, DeGeurin & Nugent, Edward A. Mallett, Houston, Tex., for Mike DeGeurin.

Mike DeGeurin, Foreman, DeGeurin & Nugent, Houston, Tex., for Jose Evarristo Reyes Requena.

Gerald Goldstein, San Antonio, Tex., for amicus curiae, Nat. Ass'n of Crim. Defense Lawyers (NACDL).

Kent A. Schaffer, Houston, Tex., for amicus curiae, Texas Crim. Defense Lawyers Ass'n (TDCLA).

Jack B. Zimmerman, Houston, Tex., Jeffrey R. White, Washington, D.C., Russ M. Herman, New Orleans, La., Mike Starr, Gen. Counsel, Washington, D.C., for amicus curiae, Ass'n of Trial Lawyers of America (ATLA).

Jim E. Lavine, Houston, Tex., for Harris County Criminals Lawyers Ass'n (HCCLA).

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, DUHE and WIENER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

We confront here the tension between the requirement that every citizen be prepard to offer his testimony to a grand jury and the entitlement of every criminal defendant to the single-minded attention of his attorney. The U.S. Attorney's office subpoenaed Mike DeGeurin, who had appeared as counsel for Jose Evaristo Reyes-Requena, to testify before a grand jury in the short interval between Reyes-Requena's pretrial detention hearing and his indictment by that same grand jury. DeGeurin moved to quash the subpoena. After a hearing, the district court granted the motion to quash. 724 F.Supp. 458 (S.D. Tex. 1989).

On the day of oral argument in our court, we issued an order reversing the district court's decision.[1] Our reasons for doing so require further explanation and a careful chronology of the proceedings to date.

I. THE PROSECUTION OF REYES-REQUENA

When late one evening, federal and state drug agents executed a search warrant on a ranch-type house in Houston, Texas, they observed Reyes-Requena arising from a bedroll on the floor of the living room, with a loaded .357 magnum revolver beneath his sleeping pad.[2] A woman and young boy were also in the house. Earlier that day, during surveillance of the property, officers had observed two individuals load boxes into a rental car, after which one person drove off while the other entered the house. The car was apprehended and discovered to contain cocaine. Until the search warrant was executed, no one else was seen entering or leaving the residence.

In the bedroom, the officers found eight U-Haul cartons containing approximately 160 separately wrapped kilogram packages of cocaine. One of the cartons was open. In the kitchen, there was an unloaded .357 magnum revolver and a package containing 1½ ounces of cocaine. A box of ammunition was located a few feet away from Reyes-Requena's bedroll. Drug paraphernalia, including tally sheets, scales, sixteen unfolded U-Haul cartons, and taping materials, were located in closets.

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1. We are informed that the term of the grand jury considering these matters will expire September 28, 1990.

2. This recitation of facts surrounding the prosecution derives from the transcript of Reyes-Requena's detention hearing.

Reyes-Requena was interviewed by an FBI agent after receiving *Miranda* warnings. According to the agent, Reyes--Requena said that he had arrived from Matamoros, Mexico, two months before; that he was unemployed; that he had met an individual whom he called "Chapa"; and that Chapa had offered Reyes-Requena the use of the house, food and money if he would stay there and safeguard the house and its contents. Reyes-Requena refused to give a physical description of Chapa other than to identify him as a Hispanic male. Reyes-Requena denied any knowledge that the boxes, which he had seen being taken into and out of the house, contained cocaine. He also denied knowledge of the revolver found under his sleeping bag.

Guadelupe, the woman found in the house, told agents that she had met Reyes-Requena in Matamoros, and he had invited her to stay in the house when she arrived from Mexico two weeks earlier. She said she did not know what was in the house and never saw anything there.

In the interim between Reyes-Requena's detention hearing and events pertinent to this matter, Reyes-Requena has been indicted, tried, and convicted of possession of cocaine with intent to distribute and possession of a firearm in the course of committing a felony. *See* 21 U.S.C. § 841(e)(1) and 18 U.S.C. § 924(c). In oral argument we were informed that Reyes-Requena has been sentenced to fifteen years' imprisonment.

II. MIKE DeGEURIN AND THE GRAND JURY SUBPOENA

A magistrate conducted a preliminary hearing concerning Reyes-Requena on September 22, 1989, four days after his arrest. Mike DeGeurin, an experienced criminal

defense counsel in private practice, appeared on the defendant's behalf. The magistrate concluded that the government had demonstrated probable cause to believe that Reyes-Requena had committed an offense, and he set bond at $100,000. The record does not reflect whether Reyes-Requena posted bond.

The same day, a grand jury in the Southern District of Texas issued a subpoena to DeGeurin directing him to appear on September 29 and produce records dealing with the fee arrangement he had made for representing Ryes-Rquena.

Events then moved rapidly. DeGeurin filed a motion to quash, supported by his affidavit. Amici curiae representing various organizations moved to intervene and support DeGeurin.[3] Neither DeGeurin nor the government proffered evidence for *in camera* inspection. The court held argument on the motion to quash on October 2 and thereafter entered an order granting the motion. Reyes-Requena was indicted on October 18.

DeGeurin's affidavit identified Reyes-Requena as his client and, after summarizing the proceedings up to October 2, stated as follows:

> The prosecutor now seeks to determine the amount of my fee and the identity of the person who has agreed to pay the fee. It is my opinion and belief that for me to reveal the amount of the fees, how it was paid, fee agreements and whether a third party was

3. These organizations were the National Association of Criminal Defense Lawyers, the Association of Criminal Defense Lawyers, the Association of Trial Lawyers of America, the Texas Criminal Defense Lawyers Association, and the Harris County (Texas) Criminal Lawyers Association.

> involved would violate my client's Fifth and Sixth Amendment rights, would violate his due process rights to a no-bill by the Grand Jury, could provide evidence against my client as an "affirmative link" to the contraband sufficient to assure his indictment and conviction, could subject him to greater penalty under the Federal Sentencing Guidelines and would be in violation of Canon 4 of the Code of Professional responsibility.

The principal grounds on which DeGeurin relied to quash the subpoena included an assertion of the attorney-client privilege, interpreted in light of this circuit's *Jones*[4] decision; Fed. R. Crim. P. 17(c); the Sixth Amendment; Guidelines for Attorney Subpoenas issued by the United States Department of Justice; and the Code of Professional Responsibility.[5]

The government contested each of these arguments. In addition, responding to the complaint that DeGeurin's grand jury testimony would force him to be a witness against his client and would provoke his disqualification, the government stated that it would not use fee information against Reyes-Requena before the grand jury or at his trial. (R. 207-08).

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4. *In re Grand Jury Proceedings* (*Jones*), 517 F.2d 666 (5th Cir. 1975).

5. DeGeurin also contended in the district court that if he responded to the subpoena, he would jeopardize both *his* rights under the Sixth Amendment and his client's Fifth Amendment right against self-incrimination, and he would fall prey to the government's intentional ploy to disqualify him as counsel for Reyes-Requena. These points were not considered by the district court nor pursued in DeGeurin's briefs here, and to the extent they have any arguable merit, they are waived. *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir. 1990).

Judge Hittner's thoughtful opinion rejected the last two grounds urged by DeGeurin,[6] but it found the first three arguments persuasive. Judge Hittner particularly relied upon his interpretation of *Jones* as establishing an attorney-client privilege that shielded DeGeurin from revealing fee information concerning Reyes-Requena, including specifically whether a third party benefactor had paid Reyes-Requena's fees. He found the timing of the issuance of the subpoena, *i.e.*, during the pendency of criminal proceedings against Reyes-Requena, to be relevant. He found that the attorney-client privilege was not being invoked as a shield for continuing illicit activity. *See In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. Unit A (1982) (en banc); *In re Grand Jury Subpoenas (Hirsch)*, 808 F.2d 498, 499 (9th Cir. 1986), *supplemented*, 817 F.2d 64 (9th Cir. 1987). He also concluded that the government's case against Reyes-Requena was weak because his "mere presence" at the house where cocaine was stored did not suggest complicity in an illegal enterprise. *Cf. United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982) ("[M]ere presence at the scene of the crime or close association with a co-conspirator will not support an inference of participation in a conspiracy. . . ."). Thus, "a subpoena to Reyes-Requena's attorney . . . could elicit information providing an affirmative connection between [Reyes-Requena] and the cocaine" and could yield evidence that "would tend to connect" the defendant to the cocaine and "may provide evidence of the existence of a conspiracy," a possible additional charge against the defendant. The opinion acknowledged that in other contexts, the information sought by the subpoena might not be privileged, but that it satisfied the *Jones*

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6. DeGeurin does not pursue on appeal the two arguments rejected by the district court.

standard of furnishing a "crucial link" in the government's case.

The district court sought further support from its supervisory power to quash grand jury subpoenas "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c). The court found that the timing of the subpoena impinged upon the attorney-client relationship and severely hindered the effectiveness of DeGeurin's representation.

The court finally held that Reyes-Requena's Sixth Amendment right to counsel was infringed by enforcement of the subpoena inquiring into the attorney's fee arrangement with his client during the course of pre-indictment proceedings.[7] This conclusion was based upon the constitutional presumption in favor of a defendant's choice of counsel. *Wheat v. United States,* 486 U.S. 153, 164, 108 S. Ct. 1692, 1699, 100 L.Ed.2d 140 (1988), the strong possibility that enforcement of the subpoena would cause counsel's disqualification during the pendency of proceedings, and the apparent absence of any overriding governmental interest.

The government timely appealed. Our appellate jurisdiction arises from either 28 U.S.C. § 1291 or 18 U.S.C. § 3731. *In re Grand Jury Subpoena (Kent),* 646 F.2d 963, 967-68 (5th Cir. Unit B June 1981).

III. DISCUSSION

We are hardly covering new ground in this appeal. The last decade has produced a number of federal cases exploring the extent to which an attorney may resist a subpoena

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7. The government does not contest that Reyes-Requena's right to counsel had already attached at the probable cause hearing. *See United States v. Gouveia,* 467 U.S. 180, 187-88, 104 S. Ct. 2292, 2296-97, 81 L.Ed.2d 1446 (1984).

issued by a grand jury that is investigating one of his clients.[8] Although such subpoenas pose the particularly troublesome possibility of intrusion by prosecutorial authorities into the attorney-client relationship, the principles on which they should be enforced now seem—with the exception of that espoused by our *Jones* decision—fairly consistent. We hope to alleviate that source of confusion here.

[1] A district court's order quashing a grand jury subpoena can only be overturned for an abuse of discretion. *Hirsch, supra,* 803 F.2d at 496; *In re Grand Jury Matters,* 751 F.2d 13, 16 (1st Cir. 1984). The district court was working under considerable pressure to evaluate the DeGeurin subpoena in time to minimize its interference at a critical stage of Reyes-Requena's defense. Nevertheless, on careful review, we must conclude that the district court incorrectly found the existence of an attorney-client privilege with respect to disclosure of the source or payment terms of DeGeurin's fees. Nothing in the record reflects that this information was either a confidential communication between DeGeurin and Reyes-Requena, or inescapably tied to such communication, and *Jones* does not make it so. Second, the record is too sparse to demonstrate a Sixth Amendment violation at the time of the hearing, and no violation can be claimed now. Third, although the court, in exercising its supervisory power over the grand jury, might not have abused its discretion in quashing the subpoena solely because of its oppressive timing, that basis for the court's action has evaporated following Reyes-Requena's conviction. The passage of time has thus transformed what would otherwise be an order supportable on very narrow grounds into one that has no support

8. See citations *infra*.

in law or in present facts. Each basis for our rejection of the court's order will be discussed in turn.

A. Attorney-Client Privilege

[2] "We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged. *In re Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666 (5th Cir. 1975); *see* cases collected *id.* at 670 n. 2." *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (8th Cir. Unit A 1982) (en banc). DeGeurin urges that *Jones* supports his claim for an exception to that general rule and consequently shields him from disclosing, *inter alia*, whether his client Reyes-Requena or an anonymous third party paid his fee.

[3] Before logically reaching the question of the application of the attorney-client privilege, however, one must determine that the claim of privilege is being made by an attorney on behalf of a client. In nearly every case that has discussed the propriety of a subpoena issued to compel an attorney to furnish fee information before the grand jury, the attorney declined to reveal the name of an anonymous client who paid the fee. *See, e.g., Pavlick, supra; In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2d Cir.) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108, 106 S. Ct. 1515, 89 L.Ed.2d 914 (1986); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983), *cert. denied sub nom. Durant v. United States*, 487 U.S. 1246, 104 S. Ct. 3524, 82 L.Ed.2d 831 (1984); *In re Grand Jury Proceeding (Chernew)*, 898 F.2d 565 (7th Cir. 1990); *see also In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d

230, 233 n. 8 (8th Cir. 1988) (disclosure of third-party fee-payer who was not client of attorney would not be protected by the attorney-client privilege).

What was overlooked by the district court, and what distinguishes this case from others analysing attorney grand jury subpoenas, is that neither the identity of the fee-payer nor the source of DeGeurin's fees for Reyes-Requena's defense has been tied to a client of DeGeurin. Certainly, DeGeurin represented Reyes-Requena, and the district court's opinion assumed that the information concerning the name of the payer and the payment arrangement of Reyes-Requena's fees was attributable to his status as a client of DeGeurin. This assumption is unfounded. DeGeurin's affidavit quoted previously, makes no claim that the person who has agreed to pay his fee is his client. The affidavit states only that if DeGeurin were to reveal the amount or source or payment terms for the fee, it would provide evidence against "his client." In context, the "client" referred to is clearly Reyes-Requena. The affidavit does not even assert that information regarding the source or payment of the fees derived from any communication between Reyes-Requena and DeGeurin.

On this fundamental basis, the instant case differs from *Jones,* in which the anonymous parties, whose names the grand jury sought and who had paid the fees of the attorneys' known clients, were *also* their clients. *Jones* rested on the premise that to identify the anonymous fee-payer clients would, under the unique circumstances of that case, both incriminate them and reveal confidential communications crucial to the government's investigation. Reyes-Requena, by contrast, was already known to be DeGeurin's client, and he retained DeGeurin for events

known to the government at the time of the grand jury subpoena. *Jones* prevented the prosecutors from stripping anonymity from a client otherwise unknown to them. If Reyes-Requena is the client who paid DeGeurin's fees, he is not unknown to the prosecutors, and *Jones* does not apply. *See In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1490-91 (10th Cir. 1990) (distinguishing *Jones* from case where it appeared that anonymous third-party payer of fees was not a client of the attorney). If a third-party benefactor paid the fees, *Jones* only comes into play if that person is DeGeurin's client. DeGeurin of course has the burden to establish his claim of attorney-client privilege as to the anonymous payer. *See Pavlick, supra*, 680 F.2d at 1029 (Rubin, J., concurring). Because DeGeurin has never averred that the anonymous benefactor of Reyes-Requena (if there is one) was his client, he cannot obtain succor from *Jones*. Our brothers in the Eleventh Circuit, bound by *Jones*, have recognized this distinction repeatedly. *In re Grand Jury Proceedings (Rabin)*, 896 F.2d 1267, 1278 (11th Cir.), *vacated as moot*, 904 F.2d 1498 (11th Cir. 1990) (en banc); *United States v. Sims*, 845 F.2d 1564, 1569 (11th Cir.), *cert. denied*, 488 U.S. 957, 109 S. Ct. 395, 102 L.Ed.2d 384 (1988); *In re Grand Jury Investigation (Harvey)*, 769 F.2d 1485, 1487 (11th Cir. 1985).

Even if DeGeurin had asserted that the anonymous fee-payer was his client, it is not at all clear that the attorney-client privilege would suppress evidence of the fact of an arrangement or payment made for Reyes-Requena's defense. Judge Rubin, concurring in *Pavlick*, contended that no attorney-client privilege had been established between the attorney and the anonymous fee-payer, as to his payments on behalf of Pavlick's other clients. 680 F.2d at

1029. Judge Rubin observed that Pavlick had presented no evidence that the communications between himself and the third-party fee-payer concerning payment of the defendants' legal expenses were for the purpose of obtaining legal advice for the third-party. *Id.; see also, In re Subpoena Duoes Tecum Served upon Shargel,* 742 F.2d 61 (2d Cir. 1984). So it would appear here. Without proof of a confidential communication between DeGeurin and any third-party fee-payer, a threshold test for application of the attorney-client privilege is not met. *See United States v. Ponder,* 475 F.2d 37, 39 (5th Cir. 1978).

Although we are convinced that a prerequisite to *Jones* is the existence of an anonymous fee-payer who is also the client of the attorney subpoenaed to testify before a grand jury, we shall, in an abundance of caution, demonstrate that *Jones* fails on its own terms to apply to this case. Compare *Pavlick* where Judge Gee's opinion for the court assumed that an attorney-client relationship existed between Pavlick and the anonymous benefactor and, based on that assumption, rendered a limited interpretation of *Jones.*

Jones is not unlike actor Peter Sellers' famous character Inspector Clouseau: it has been misunderstood because it invited misunderstanding. We conclude that a proper reading of *Jones,* followed by Pavlick, demonstrates that those cases did not fashion a "last link "or "affirmative link" attorney-client privilege independent of the privileged communications between an attorney and his client. Thus, the "last link" or "affirmative link" language in these cases does not significantly amend the normal scope of the attorney-client privilege, nor is it applicable to the case before us.

In *Jones*, the court quashed an attorney subpoena seeking to ascertain the names of clients who had paid substantial sums, partly in cash, for bonds and representation by the attorneys of certain drug-traffickers. The facts are peculiar, even in this day of aggressive prosecution:

> Among those "peculiar facts" was that the six attorneys drawn before the grand jury in *Jones* represented a generous portion of the criminal law bar of the lower Rio Grande Valley area, and the project was a rather broad attempt to canvass that portion for information detrimental to certain of its clients: that each had paid an attorney or attorneys amounts greater than his reported gross income during the year of payment.

Pavlick, 680 F.2d at 1027. Two points are critical to understanding *Jones*. First, the court stated repeatedly that its decision was fact-specific: "Other cases must turn on their own merits." *Jones*, 517 F.2d at 668.[9]

[4] Second, despite the opinion's frequent references to the potentially incriminating nature of the testimony sought from the attorneys, *Jones* does not seem to rest on that fact *apart from* its necessary, simultaneous revelation of confidential communications. Thus, the court cites *Baird v. Koerner*, 279 F.2d 628, 688 (9th Cir. 1960),

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9. Other indications of the opinion's narrow compass include the following: "Our decision to reverse rests on . . . a discrete issue. . . ." *Id.* "The cases applying the exception [to the rule of non-confidentiality] have carved out only a limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-to-case basis." *Id.* at 671. "We need not say a great deal more in order to decide this case on its peculiar facts." *Id.* at 675. "[O]ur decision should not be taken as any indication of how we would decide a similar question if the inculpatory value of sought-after testimony were less obvious or largely attenuated. Each of these cases must turn on its own facts." *Id.*

for the proposition that revealing a client's identity would, under the circumstances of that case, reveal the confidential purpose for retaining the attorney. *Jones* then refers to Wigmore's admonitions that "the privilege should be held to protect the client from disclosure by the attorney of the client's 'ultimate motive' for seeking legal advice." *Jones*, 517 F.2d at 672; *see also* 8 J. Wigmore, *Evidence* § 2318, at 609 (J. McNaughton rev. 1961). Finally, *Jones* cites with approval a Fourth Circuit case in which an attorney was not forced to divulge to the grand jury the name of his client, where to do so would reveal the confidential motive for retention. *See NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965). In *Harvey*, the grand jury had already learned that the subpoenaed attorney had hired a private investigator to learn about certain labor union activities. Identifying the client would have breached the attorney-client privilege by disclosing the confidential purpose for retention. In light of such citations, *Jones* seems reconciliable with, if perhaps a modest extension of, the now-settled principle that the attorney-client privilege shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications such as the confidential motive for retention.[10] *See, e.g., In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984). The opinion's references to "links in the chain," inartfully directed at the inculpatory nature of the information, actually depend upon the

10. This analysis of *Jones* has recently been explained in greater detail by the Eleventh Circuit, albeit in an opinion vacated for mootness by the court *en banc*. *See In re Grand Jury Proceedings (Rabin)*, 896 F.2d 1267, 1270-73 (11th Cir.), *vacated as moot*, 904 F.2d 1498 (11th Cir. 1990) (en banc).

"link" between the inculpatory information and the disclosure of a confidential communication.[11]

Our decision in *Pavlick* is not inimical to this reading of *Jones*, nor can it be said to endorse even the "last link" concept that it attributes to *Jones*. The majority of the en

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11. As the government's brief pointed out, *Jones* "stands needlessly alone" if it created an attorney-client privilege for information that is inculpatory without revealing any confidential communication. Other circuits have either rejected a literal interpretation of the "last link" doctrine or have interpreted *Jones* (and *Baird v. Koerner, supra*) to protect client identity and fee information if disclosure would reveal confidential communications. *See In re Grand Jury Subpoena Duces Tecum Served upon Shargel*, 742 F.2d 61 (2d Cir. 1984) (holding that absent "special circumstances," identity of client and source of fee are not protected by attorney-client privilege and rejecting cases that adhere to "incrimination rationale"); *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984) (rejecting "last link" if it is tied to inculpatory facts rather than to confidential communications and holding that identity of client is protected where so much of actual attorney-client communication has been disclosed that further identification will reveal the confidential communication); *NLRB v. Harvey, supra*, 349 F.2d at 905; *In re Grand Jury Investigation No. 83-2-35*, 725 F.2d 447, 4452-54 (6th Cir. 1983), *cert. denied, sub nom. Durant v. U.S.*, 467 U.S. -1246, 104 S. Ct. 3524, 82 L.Ed.2d 831 (1984) (rejecting literal "last link", but holding that client identity could be privileged if disclosure would reveal confidential client communications); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir. 1990) (holding that privilege applies if revealing client's identity would disclose the confidential motive for attorney's retention), *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988) (holding that *Baird* applies only when it is shown that disclosure of client's identity or fee arrangement would reveal information "tantamount" to a confidential professional communication); *In re Grand Jury Subpoena for: Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983) (per curiam) (interpreting *Baird* as based on the possible disclosure of confidential communications if identity of clients was disclosed); *see also* D. Louisell & C. Mueller, *Federal Evidence* § 210, at 780 n. 25 (1985), (describing *Jones* as shifting back and forth in its rationale for supporting the privilege). We believe that *Jones* and *Pavlick*, as we read them, and as they have been construed by our sister circuits, are generally consistent with these authorities. The Seventh Circuit and the Eleventh Circuit have construed *Jones* in similar fashion. *See In re Witnesses Before the Special March 1980 Grand Jury, supra; Rabin, supra* note 10.

banc court held that attorney Pavlick could not refuse to reveal the name of an anonymous fee-payer who was also his client, because that information fell within the crime-fraud exception to the attorney-client privilege: part of the fee-payer's illegal agreement with the attorney's known clients was a promise to "take care" of them if arrested. *Pavlick* cited the crime-fraud exception as the critical distinction between that case and *Jones*. 680 F.2d at 1028. The majority's further comments on *Jones* are superfluous to this reasoning. Further, the court's recognition of *Jones* as a limited and narrow exception to the general rule of non-confidentiality of information concerning client identities and fees; its emphasis on the "peculiar facts" of *Jones;* and its "last link" description of the case are hardly a ringing endorsement of *Jones*. *Id.* at 1027. *Pavlick* may be read as limiting *Jones* to its precise facts. Certainly, *Pavlick* is consistent with confining *Jones* to the recognized rule that client retention and fee information may become privileged if their revelation would in itself reveal a confidential communication.

In none of its guises does the misunderstood *Jones* case permit DeGeurin to shield from the grand jury the fee arrangements for Reyes-Requena and the identity of the fee-payer. First, to the extent *Jones* is properly understood as protecting a disclosure that would reveal the confidential motive for retention of the attorney, that rationale cannot apply here. Reyes-Requena's representation by DeGeurin is obvious. DeGeurin took no steps to demonstrate any confidential communication involved in his fee arrangement with Reyes-Requena. His conclusory affidavit is insufficient. *See In re Grand Jury Investigation No. 83-2-25*, 723 F.2d 447, 454 (6th Cir. 1983), *cert. denied sub nom. Durant v. United States*, 467 U.S. 1246, 104 S. Ct. 3524, 82 L.Ed.2d 831 (1984).

Second, except for the circumstance of its timing discussed below, the grand jury subpoena to DeGeurin is not fraught with the "peculiar facts" that underlay *Jones*. DeGeurin alleged, but offered no proof that the government's motive was to disqualify him, and other capable private defense counsel, from representing Reyes-Requena. The government's interest in the sourc of Reyes-Requena's fee is legitimate, for the case suggests the existence of a significant cocaine distribution network in which Reyes- Requena was a minor figure. In distinction to *Jones*, the government's motives in this case seem to be purely investigatory rather than inculpatory. Whereas in *Jones*, the government was on the verge of pressing tax evasion charges against thhe unidentified but suspected clients, here, it is undisputed that the government has no inkling of the source of Reyes-Requena's fees. Speculation about extension of, the now-settled principle that the attorney-the source of the fees is premature, hence non-probative and non-inculpatory as to Reyes-Requena.

[5] Third, even if we apply the "last link doctrine" literally—for the first time in this court since *Jones* was decided fifteen years ago—DeGeurin's fee information provides no "affirmative link," much less a "last link," between Reyes-Requena and a criminal indictment. That a third party may have paid Reyes-Requena's legal fees no more exposes Reyes-Requena to a conspiracy charge than do the already-disclosed connections between him and both "Chapa" and the other individual who loaded the car outside the house where he was arrested. The district court erred, whether as a matter of fact or of law, in accepting defense counsel's characterization of the government's case as "weak" and based on the "mere presence" doctrine, in order to bolster its finding of an "affirmative

link." The transcript of the detention hearing shows that Reyes-Requena had spent two months living at and "guarding" a substantial cocaine storage depot and that he disingenuously claimed not even to know about the loaded revolver lying beneath his bedroll, with ammunition nearby. Without laboring the point further, the evidence was sufficient to convict Reyes-Requena without any attorney fee information.

This leads us to an additional fact undercutting the trial court's finding of an "affirmative link"; the government represented in its pleadings to the district court that it would not use Reyes-Requena's fee information against him in the grand jury or at trial.[12] To the extent that *Jones* rests, however tenuously, on the inculpatory nature of the fee information, such a concern is wholly vitiated here by the government's concession.

Finally, *Jones* itself stated that identification relating to retention of the attorney by a third party who is not a client or the client's agent "might lend weight to a contrary result." 517 F.2d at 675 (citing *Baird v. Koerner*, *supra*, 279 F.2d at 682). Thus, any claim that the recognition of an attorney-client privilege is demanded by *Jones* depends on an initial admission, not made here, that Reyes-Requena himself paid the fee to DeGeurin.

The district court, struggling with a difficult issue in a short period of time, may be forgiven its error in interpreting and applying *Jones*. Information concerning who paid Reyes-Requena's fee to DeGeurin and the

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12. The pleadings may leave open the possibility that the information could be used against Reyes-Requena at his sentencing. We refuse to speculate on this possibility, which could be addressed by the Sentencing Guidelines and Fed. R. Crim. P. 32.

amount, method or terms of payment is not exempted from disclosure by the attorney-client privilege.

B. Rule 17(c) Supervisory Power

The district court may quash or modify a grand jury's subpoena if it is found too be unreasonable or oppressive. Fed.R.Crim.P. 17(c). Few cases are akin to this one in quashing a subpoena because of its timing—because it forced a criminal attorney to interrupt his representation of his client at the critical post-detention/pre-indictment phrase of the case.[13] *See In re Grand Jury Matters,* 751 F.2d 13, 16 (1st Cir. 1984).

[6, 7] The decision too quash a grand jury subpoena must be undertaken carefully:

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free too pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

United States v. Dionisio, 410 U.S. 1, 17-18, 98 S. Ct. 764, 773-74, 35 L.Ed.2d 67 (1978) citations and footnote omitted). Attorneys "are not exempted from this duty to appear" before the grand jury. *In re Grand Jury*

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13. It is not contested that, apart from DeGeurin's privilege claims, the evidence sought by the grand jury was relevant and specific and not subject to Rule 17(c) challenge to that extent.

Subpoena Served upon Doe, 781 F.2d 238, 249 (2d Cir.) (en banc) *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108, 106 S. Ct. 1515, 89 L.Ed.2d 914 (1986)). "There can be no absolute rule that frees an attorney, merely because he is such, too refuse to give unprivileged evidence to a grand jury." *In re Grand Jury Matters, supra*, 751 F.2d at 19.[14] The grand jury's right to obtain every man's evidence is substantively limited only by express constitutional, common law, or statutory privileges. *Bransburg v. Hayes*, 408 U.S. 665, 688, 92 S. Ct. 2646, 2660, 33 L.Ed.2d 626 (1972).

[8] As we have seen, DeGeurin may not invoke the attorney-client privilege here. As will be seen, the Sixth Amendment privilege he claimed for Reyes-Requena rested on speculation *apart from* the matter of the subpoena's timing. The Second Circuit described the district court's supervisory role as follows:

> With respect to Colombo's constitutional claims in the post-indictment context, the Sixth Amendment assures him the right to be free of unduly burdensome interruption of his counsel's trial preparation and protects him from any unnecessary or arbitrary disqualification of his counsel. Assessment of whether the subpoena is unreasonable or burdensome, especially when sought to be enforced against counsel for an indicted defendant, can be determined under the standards of Rule 17(c), informed by Sixth Amendment considerations. The risk of disqualification should remain for determination at an in *limine* hearing by the trial judge who must weigh the probative value of the information the govern-

14. Where no Sixth Amendment right to counsel has attached and the information sought by a grand jury is not within the attorney-client privilege, no motion to quash should be granted. *Doe, supra*, 781 F.2d 243-50.

> ment seeks against the loss of counsel of the accused's choice.

Doe, supra, 781 F.2d at 250. Although this statement focuses on a possible disqualification of defense counsel, its considerations are germane too a claim that the timing of the subpoena is unreasonable or oppressive.

In this case, the district court's exercise of its discretion to quash the subpoena because it created a serious interference with Reyes-Requena's relationship with his attorney is justified for several reasons. Reyes-Requena's Sixth Amendment rights had attached. The prosecution against him was moving swiftly—an indictment issued within three weeks of Reyes-Requena's detention hearing. DeGeurin's representation of Reyes-Requena was effectively stalled during the two-to-three-week interval that he contested the subpoena. The government made no effort to explain, even rhetorically, why it was necessary to subpoena DeGeurin during that critical juncture in his representation of the defendant. The government made not a single argument in the district court or before this court to suggest that a brief delay in the process, until a lull in the Reyes-Requena prosecution or until after his conviction, would have been imprudent.[15] Thus, when the district court quashed the subpoena to DeGeurin, solely because of its oppressive timing, we do not believe that the court abused its discretion. Alternatively, the court could have modified the subpoena, continuing it too a future date that would not have interfered so starkly with DeGeurin's representation of his

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15. We do not imply that the government was required to justify its subpoena of DeGeurin substantively beyond the usual minimum requirements of relevance, specificity, and timeliness. The government could, however, have furnished some factual basis, if one existed, for the exigency of enforcing a subpoena at this particularly onerous time.

client. As the government did not suggest a modification, the district court can be excused for not exercising its discretion to grant one.

The government would distinguish the only appellate case that has affirmed a district court's decision to quash a grand jury subpoena issued against defense attorneys who were preparing for trial, namely, *In re Grand Jury Matters, supra,* 751 F.2d 18. According to the government, that case turned on a finding that the subpoena was issued for "harrassment," and the case has been limited by later First Circuit authority. *See In re Grand Jury Proceedings (Wilson),* 760 F.2d 26 (1st Cir. 1985). We disagree with the government. The earlier case that quashed the subpoena does not confine its analysis to the sole circumstance of harassment. Moreover, the burden on DeGeurin of complying with the subpoena he received was, because of its timing, probably at least as oppressive as the combined effect of bad timing and harassment in *In re Grand Jury Matters.* The state court prosecution with which that subpoena interfered was delayed for months; while Reyes-Requena's prosecution moved swiftly not withstanding the dispute over the subpoena. Second, the government makes too much of the later First Circuit case involving attorney Wilson. The court pointed out that Wilson asserted a completely untenable basis, as a former civil attorney for a client under investigation, for refusing to respond too the grand jury. In so doing, the court stated the general rule that courts should normally enforce grand jury subpoenas. *Wilson,* 760 F.2d at 27. That rule, with which we fully concur, does not conflict with the court's Rule 17(c) supervisory authority to modify or quash a subpoena whose timing may be oppressive or unreasonable. Each claim for relief must be

carefully and independently evaluated under Rule 17(c).

Amici curiae have proposed that its court exercise our "supervisory power" to promulgate detailed guidelines governing the enforcement of grand jury subpoenas against attorneys. This we decline to do. We are reluctant to interfere with the broad investigatory authority of the grand jury. Requests for general rules should be addressed to Congress or to the Judicial Conference of the United States. In any event, judicial attempts to regulate attorney appearances before the grand jury would tend to create exemptions beyond matters of privilege and constitutional limitations and would transgress the command of *Bransburg, supra.*

Despite our general sympathy with the district court's decision to quash the DeGeurin subpoena when it was issued, new circumstances have arisen in the wake of Reyes-Requena's conviction. DeGeurin cannot claim that his client's Sixth Amendment interest remains at the same high level as when the subpoena was originally quashed. *See In re Grand Jury Subpoenas (Anderson),* 906 F.2d 1485, 1495 (10th Cir. 1990). Although we could sustain the motions to quash based upon events as they stood nearly a year ago—leaving the government to issue a new subpoena to DeGeurin in the short time remaining until the grand jury's term expires—to do so would foster needless delay. Because this basis for the district court's action has vanished, it furnishes no support for a refusal to enforce the subpoena at this time. *Cf. Doe, supra,* 781 F.2d at 251 (finding record before appellate court sufficiently comprehensive to evaluate Rule 17(c) claim rather than cause further delay by remanding issue to district court).

C. Sixth Amendment

[9] The district court also referred to the Sixth Amendment itself as a ground for quashing the subpoena. The court worried that the subpoena to DeGeurin "under the circumstances presented here threatens the integrity of the adversarial process." The court also saw a "strong possibility that enforcement of a government-issued subpoena to [Reyes-Requena's] attorney will cause counsel's disqualification during the pendency of proceedings." Neither of these reasons supports quashing the subpoena.

We note first that the Sixth Amendment rationale has become moot with the passage of time. At the present, post-conviction stage of the proceedings against defendant Reyes-Requena, the possibility of disqualification can be described as insignificant. If such disqualification is what the district court saw as the threat to the integrity of the adversarial process, that threat no longer looms. Similarly, any threat that the subpoena would turn DeGeurin into a witness against his client Reyes-Requena did not materialize now after trial and conviction.

If we consider DeGeurin's Sixth Amendment claims as of the time of the hearing to quash the result is no different. As for disqualification, this possibility depends on unsupported speculation, about the content of the sought-supported speculation about the content of the sought-after testimony, the grand jury's response to it, and the government's subsequent use of it. DeGeurin argues that he *might* have become a witness too the facts to be presented in the government's case against Reyes-Requena. The government correctly points out that in order for a conflict to have arisen, a whole series of events would have to have taken place:

> The identity of the benefactor would have to incriminate Reyes-Requena. An indictment would have to be returned that reflected a conflict of interest. The theory of prosecution would have to give rise to irreconcilable differences. [DeGeurin] would have to be advised that he would be called as a government witness.

The courts of appeals have consistently "decline[d] to speculate that all those events will occur." *Doe, supra,* 781 F.2d at 245; *see also Anderson, supra,* 906 F.2d at 1494-95; *Tornay v. United States,* 840 F.2d 1424, 1489-40 (9th Cir. 1988); *In re Klein,* 776 F.2d 628, 633 (7th Cir. 1985).

The Tenth Circuit recently addressed the disqualification/conflict issue and concluded that "a subpoena served upon counsel during representation of a client . . . should be quashed only upon a showing that the subpoena would create actual conflict between the attorney and client." *Anderson, supra,* 906 F.2d at 1494. In this case, the government specifically denied any intent to use the sought-after fee information against Reyes-Requena before the grand jury or at his trial. DeGeurin has offered us nothing more than his unsupported assertion that a conflict "would immediately arise." Thus, we must conclude that "[t]he record in this case is devoid of evidence that would establish an actual conflict between [DeGeurin] and [Reyes-Requena] even if the fee information were disclosed." *Id.*

This does not mean we are insensitive to concerns about unscrupulous attempts by the government to overcome the "presumption in favor of [a defendant's] counsel of choice" recognized by the Supreme Court in *Wheat v. United States,* 486 U.S. 159, 164, 108 S. Ct. 1692, 1700,

100 L.Ed.2d 140 (1988). Like the Second Circuit, however, "[w]e decline to adopt what amounts to a *per se* rule that testimony of an attorney before a grand jury as to benefactor payments inevitably will lead to disqualification of that attorney from representing his client." *Doe, supra,* 781 F.2d at 245. Only a showing of actual conflict, rather than mere speculative assertions, may overcome the concrete "obligation of every person to appear and give his evidence before the grand jury." *United States v. Dionisio,* 410 U.S. 9-10, 93 S. Ct. 764, 769, 35 L.Ed.2d 67 (1978).

[10] As for "the integrity of the adversary process," we think that district courts can better address the underlying concerns by reference to Rule 17(c) rather than the Sixth Amendment. In certain cases, a subpoena issued to an attorney after adversary proceedings have begun against his client but before the close of trial may interfere with the attorney's representation of his client. To the extent that such interference is "unreasonable or oppressive," the court may modify the timing of compliance according to the standards enunciated previously in our opinion. Both the First Circuit and the Second Circuit have adopted this approach to Sixth Amendment claims not involving conflicts. *See In re Grand Jury Matters, supra,* 751 F.2d at 18-19; *Doe, supra,* 781 F.2d at 250.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court was REVERSED, and the cause was REMANDED for further proceedings consistent herewith.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6252

IN RE: Grand Jury Subpoena for Attorney Representing Criminal Defendant JOSE EVARISTO REYES-REQUENA.

Appeal from thhe United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 19, 5 Cir., 1990, ____F.2d____)
(October 11, 1990)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

By: /s/ Edith H. Jones
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MISCELLANEOUS NO. H-90-586

IN RE: GRAND JURY SUBPOENA
FOR ATTORNEY REPRESENTING
CRIMINAL DEFENDANT, JOSE
EVARISTO REYES-REQUENA

ORDER

Pending before the Court is the Motion to Compel Compliance with Court Order and for Judgment and Commitment for Contempt filed by the United States of America ("government"). The government seeks to hold Mike DeGeurin ("DeGeurin") in civil contempt of this Court's previous orders for his refusal to comply fully with a grand jury subpoena. Having considered the motion, the submissions of all parties, the argument of counsel and amici curiae at a hearing in open court on December 11, 1990, and the applicable law, this Court determines that the government's motion should be denied.

I. BACKGROUND

In October 1989, a federal grand jury indicted Jose Evaristo Reyes-Requena ("Reyes-Requena") for possession with intent to distribute in excess of five kilograms of cocaine. Mike DeGeurin, a criminal defense attorney, represented Reyes-Requena throughout the proceedings against him. Shortly after a combined preliminary examination and detention hearing in Reyes-Requena's case, DeGeurin received a grand jury subpoena *duces tecum* seek-

ing information concerning the Reyes-Requena legal fee arrangement. On October 31, 1989, this Court granted DeGeurin's motion to quash the grand jury subpoena, holding *inter alia* that the information sought in connectoin with the grand jury subpoena would violate the attorney-client privilege existing between DeGeurin and his client Reyes-Requena.[1] *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena,* 724 F. Supp. 458, 464 (S.D. Tex. 1989). The Fifth Circuit reversed that decision. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena,* 913 F.2d 1118 (5th Cir. 1990). The Fifth Circuit reasoned that "[n]othing in the record reflect[ed] that this information [sought by the grand jury] was either a confidential communication between DeGeurin and Reyes-Requenda, or inescapably tied to such a communication. . . ." *Id.* at 1122.

Following the Fifth Circuit decision, DeGeurin was issued a subpoena *duces tecum* commanding him to appear to testify before the grand jury on December 6, 1990. DeGeurin moved this Court to quash the grand jury subpoena on grounds that disclosure would contravene an attorney-client relationship, not between DeGeurin and Reyes-Requena, but between DeGeurin and

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1. This Court's October 31, 1989 order quashing the grand jury subpoena was based on three grounds: (1) the attorney-client privilege, (2) the Court's supervisory power under Fed. R. Crim. P. 17(c), and (3) the Sixth Amendment of the United States Constsitution. In the interim between this Court's order quashing the subpoena and the Fifth Circuit's opinion on appeal of that order, Reyes-Requena was convicted on the aforementioned indictment and sentenced to 15 years in the federal penitentiary. The Fifth Circuit concluded that Reyes-Requena's conviction mooted both the Rule 17(c) and Sixth Amendment grounds for quashing the grand jury subpoena. *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena,* 913 F.2d 1118, 1129 (5th Cir. 1990).

a third-party benefactor who paid DeGeurin to represent Reyes-Requena. Additionally, an anonymous Intervenor ("Intervenor"), the third-party benefactor, intervened in the proceeding and moved this Court to protect Intervenor's own rights by quashing the grand jury subpoena issued to DeGeurin. However, in light of the Fifth Circuit ruling in *Reyes-Requena,* this Court ordered DeGeurin to comply with that subpoena. In the instant motion, the government asserts that DeGeurin did not fully comply with the subpoena *duces tecum* because he refused to reveal the identity of Intervenor and the precise amount of fees paid. Therefore, the governmnt seeks to have DeGeurin committed to the custody of the United States Marshal for the Southern District of Texas until such time as he shall obey this Court's order or until the expiration of the grand jury that issued the subpoena *duces tecum.* This Court ordered DeGeurin to appear on December 11, 1990 and show cause why he should not be held in contempt of court.

II. THE ATTORNEY-CLIENT RELATIONSHIP

DeGeurin argues that an attorney-client relationship between himself and the third-party benefactor, the anonymous Intervenor prevents him from answering the grand jury questions fully. DeGeurin acknowledges that the Fifth Circuit unconditionally rejected his argument that his attorney-client relationship with Reyes-Requena prevents him from revealing the source and amount of legal fees used in Reyes-Requena's defense. DeGeurin now argues, however, that the rights of the *Intervnor,* whom he alleges is also his client, were not litigated previously. DeGeurin asserts that the principal question previously before the Fifth Circuit was whether DeGeurin could be forced to

reveal the mere *existence* of a third-party benefactor, despite his claims of a privilege emanating from his relationship with Reyes-Requena. DeGeurin argues that he has adhered to the Fifth Circuit's resolution of this question against him by revealing to the grand jury the mere existence of a third-party benefactor. DeGeurin still refuses to reveal to the grand jury the Intervenor's identity or the amount of legal fees that Intervenor paid on Reyes-Requena's behalf.[2] DeGeurin argues that disclosure of the information would reveal a confidential communication. Thus, DeGeurin asserts that the existence of an attorney-client relationship between himself and Intervenor, and the ramifications of such a relationship on the need for disclosure, are only now ripe for consideration.

The existence of an attorney-client relationship between DeGeurin and Intervenor has not been previously litigated. In fact, the Fifth Circuit noted that "DeGeurin has never averred that the anonymous benefactor of Reyes-Requena (if there is one) was his client." *Reyes-Requena,* 913 F.2d at 1123. Notwithstanding DeGeurin's failure to raise the relationship previously, the government concedes that DeGeurin is entitled to offer evidence of an attorney-client relationship at this stage of the proceeding. DeGeurin proffered evidence, *in camera,* to establish the existence of an attorney-client relationship between himself and Intervenor. The government urges this Court to find, however, that this evidence should not be considered credible in light of DeGeurin's failure to submit is previously.

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2. This Court notes that during his appearances before the grand jury, DeGeruin disclosed the identity of a different third-party benefactor, who is not DeGeurin's client, and the partial amount of fees paid by that benefactor. DeGeurin does not assert that fee information regarding a non-client third-party benefactor is protected by an attorney-client privilege.

Nevertheless, having considered, in *camera*, DeGeurin's proffered evidence of the existence of an attorney-client relationship between himself and Intervenor, this court finds that an attorney-client relationship between DeGeurin and Intervenor existed prior to the issuance of the first grand jury subpoena regarding the source and amount of fees paid on behalf of Reyes-Requena. This Court further finds that the relationship continues to exist at this time.

III. CONFIDENTIAL COMMUNICATION

"Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976). "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys." *Id.* However, because "the [attorney-client] privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Id.* Thus, the privilege protects only confidential communications by a client to an attorney made in order to obtain informed legal assistance. *Id.*

As a general rule, client identity and fee arrangements are not protected as privileged. *In re Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666 (5th Cir. 1975). However, the Fifth Circuit has enunciated a narrow exception under *Jones* to the general rule of non-confidentiality of information concerning client identities and fees: "[C]lient retention and fee information may become privileged if their revelation would in itself reveal a confidential communication." *Reyes-Requena*, 913 F.2d at 1126 (citing *Jones*, 517 F.2d at

688, and *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. Unit A 1982) (en banc)). Thus, *Jones* "protect[s] a disclosure that would reveal the confidential motive for retention of the attorney." *Reyes-Requena*, 913 F.2d at 1126.

In *Reyes-Requena*, the Fifth Circuit did not explicitly rule whether DeGeurin could bring himself within the *Jones* exception, because the court did not have before it evidence of the relationship between DeGeurin and Intervenor. *Id.* at 1124 (holding that "[e]ven if DeGeurin had asserted that the anonymous fee-payer was his client, it is not at all clear that the attorney-client privilege would suppress evidence of the fact of an arrangement or payment made for Reyes-Requena's defense"). DeGeurin now asserts that the anonymous fee-payer is his client. Because of the new circumstances, this Court faces a question of first impression in the Fifth Circuit.

The Seventh Circuit recently addressed this question in a case involving very similar facts. *See In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir. 1990). Cherney, a criminal defense attorney, was subpoenaed to reveal the identity of an unknown third party who had paid his fees to represent a criminal defendant, Hrvatin. *Id.* at 566. Upon review of documents *in camera*, the district court held that the information was privileged. *Id.* at 567. The Seventh Circuit upheld the district court's finding of privilege (1) because the fee-payer was also a client and (2) because revelation of his identity would be "tantamount too revealing the premise of a confidential communication: the very substantive reason that the client sought legal advice in the first place." *Id.* at

568. The *Cherney* court emphasized the distinction between a disclosure that would reveal a confidential communication and a disclosure that would incriminate the client; *Cherney* protects as necessarily privileged only the former. Id. at 568-69.

The situation faced by the Seventh Circuit in *Cherney* fits within the narrow circumstances to which the Fifth Circuit has confined the rule in *Jones*. Moreover, DeGeurin faces the identical dilemma that Cherney faced. If DeGeurin reveals the identity of Intervenor, the confidential motive for Intervenor's retention of DeGeurin will be exposed as apparent. The documents submitted in *camera* demonstrate the confidential motive for Intervenor's retention of DeGeurin. The representation of Reyes-Requena was not the sole motive. Rather, Intervenor retained DeGuerin to represent Reyes-Requena and Intervenor *jointly* for a confidential purpose. The revalation of the fee arrangement with Intervenor in this case will expose that confidential purpose, and therefore, *Jones* protects as privileged information concerning the fee arrangement.

This Court musta continue to obe mindful of the goal of the attorney-client privilege: to enable individuals to obtain informed legal assistance. *See Fisher,* 425 U.S. at 403. In light of that purpose, this Court is further persuaded by, and hereby adopts, the policy underlying the *Cherney* decision:

> The privilege may well at times serve to preclude an attorney from incriminating his client but this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice. Invading the privilege may

> allow the government to prosecute more criminals but will have a grave effect on our justice system as clients, knowing that their confidential communications may be subject to disclosure, will eventually be less than candid with their attorneys or will consider foregoing legal advice altogether. This cannot be a desired result.

Cherney, 898 F.2d at 569.

Based upon the foregoing, it is

ORDERED that Government's Motion to Compel Compliance with Court Order and for Judgment and Commitment for Contempt is DENIED.

SIGNED at Houston, Texas, on this the 17th day of December, 1990.

/s/ DAVID HITTNER
David Hittner
United States District Judge